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BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

In the Matter of the Petition of Genwal Resources, Inc. for Review of Division Order DO10A, Crandall Canyon Mine	**DIVISION'S** **REPLY TO GENWAL'S MOTION TO STRIKE** **AND** **REPLY TO MOTION FOR DECISION ON LEGAL ISSUES** Docket No. 2010-026 Cause No. C/015/0032

The Division of Oil, Gas and Mining (Division) Replies to Genwal's Motion to Strike the Division's Supplemental Hydrologic Evaluation Report and to Genwal's Motion for a Decision on Legal Issues, as follows.

REPLY TO GENWAL'S MOTION TO STRIKE

Genwal seeks to Strike Exhibit B to the Division's Motion to modify Division Order 10A. Exhibit B is a report dated June 2, 2011 submitted by the Division's hydrologist updating the Division's previous Hydrologic Evaluation Report conducted

one year earlier and used as the basis for the Division Order 10A. The motion seeks to strike the report because it contains alleged "confidential data" that Genwal claims to be "inadmissible in this matter without Genwal's consent" based on the terms of a Stipulation entered into as part of the agreement to conduct settlement negotiations. The data claimed to be confidential is data collected as a result of an agreement reached during settlement negotiations to increase the frequency of the sampling of the discharge water to twice monthly rather than the monthly frequency that was otherwise required. The data otherwise collected monthly is not understood to be included in the objection.

The Division opposes the Motion to Strike for three reasons: (1) the data obtained from the more frequent sampling and used in the report is not covered by the Stipulation; that is, it is not evidence of conduct or statements made in compromise negotiations and not protected under Rule 408 of the Utah Rules of Evidence; (2) the data objected to is independently required and discoverable and is not offered as evidence of compromise and therefore admissible under Rule 408; and (3) the data that is claimed to be protected does not materially affect the conclusions or validity of the report and therefore its admission is not prejudicial to the Petitioners.

ARGUMENT

1. **The data claimed to be confidential and protected is not covered by the Stipulation or Rule 408 of the Utah Rules of Evidence.**

There is no agreement to "hold all statements and facts adduced as a result of settlement negotiations in confidence" as claimed. (Petitioners' Motion to Strike, p. 1). The Stipulation Regarding Use of Statement and Facts Adduced as a Result of Settlement Negotiations (Stipulation) states: *"evidence of conduct or statements made in the*

compromise negotiations will be protected pursuant to Rule 408 of the Utah Rules of Evidence". (Stipulation, p. 1, emphasis supplied) This language was taken directly from the language used by the referenced Rule 408 of the Utah Rules of Evidence.[1]

Additional data collected as a result of a more frequent sampling regimen, even though resulting from an agreement made during negotiations, are "not evidence of conduct or statements made in the compromise negotiations". The data does not in anyway reflect or constitute evidence of a compromise or offer of settlement. The purpose of Rule 408 and the Stipulation is to allow for frank an open discussions of offers of settlement and compromise without fear that evidence of such admissions or offers to settle will be used later in the hearing to weaken or prove the contested claim. The rule and Stipulation by their plain meaning do not include the additional data that were collected by both the Division and Genwal outside of the negotiations, and were submitted to the Division outside of the negotiations. Even an agreement to additional sampling is not evidence of a compromise since the data could be used to disprove as well as to prove the Petitioner's claims. There was not a separate agreement to keep the data confidential.

2. The data objected to is not offered for the purpose of providing evidence of an offer of compromise or offer to settle, is independently required and discoverable and therefore is admissible.

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[1]Rule 408. Compromise and Offers of Settlement. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to proved liability for or invalidity of the claim or amount. **Evidence of conduct or statements made in compromise negotiations** is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, ..." (Utah Rules of Evidence (2011) (emphasis supplied)

Rule 408 of the Utah Rules of Evidence provides that the rule does not require the exclusion of evidence otherwise discoverable or when the information was offered for another purpose[2].

The purpose of offering the report and including the data from all of the sampling is to provide the Board with the most complete set of data regarding the water quality of the discharge waters subsequent to the observation of pollutional levels of iron. The data is needed to determine if there is sufficient evidence of potential long term contamination to require long term bonding for water treatment. The data is not prejudicial but merely the facts collected. The report and all the data included in it will be subject to cross-examination. There is nothing about using the data in the report that can be said to suggest an offer of settlement or compromise.

Genwal is obligated to provide supplemental information "as the Division may request to ensure compliance with the [Act]" (R645-301-724.420 Utah Admin. code (2011)), and to provide supplemental information 'if adverse impacts on or off the proposed permit area may occur to the hydrologic balance. . ." (R645-301-724.500 Utah Admin. code (2011)). The only change to the prior obligation was the frequency of the data collection. The increased frequency was agreed to as a better indicator of trends.

The parties' Stipulation did not limit the use of the additional data to purposes of settlement negotiations. The data generated as part of the more frequent monitoring was agreed to be collected by both the Division and Genwal and to be submitted to the Division outside of the negotiations. The obligation to collect data more frequently was not required to cease if negotiations ceased. The data was not limited to use in

[2] Ibid.

negotiations. It was agreed that more frequent monitoring would be useful to all parties to better understand the hydrologic system and to that purpose the additional data was generated. The additional data is not only discoverable but was agreed to be provided without any discovery request.

Genwal alleges that there was a verbal agreement not to upload the data to the Division's website. Even if true, and there is no submitted evidence of such an agreement, such a verbal agreement does not preclude (and Genwal does not allege there is a restriction) to the use of the additional data by the Division for its regulatory purposes including updating its Hydrologic Evaluation. Rather it was the clear purpose and intent of the agreement to gather additional data that it would provide a more accurate indication of the water quality trends. The data that is claimed to be protected does not materially affect the report's conclusions and is not prejudicial to the Petitioners' in any respect.

3. The data that is claimed to be protected does not materially affect the conclusions or validity of the report and therefore its admission is not prejudicial to the Petitioners.

Even if the more frequent data were to be excluded from the Supplemental Hydrologic Report as being within the scope of the Stipulation and Rule 408, the substance of the Report is not affected by this exclusion. The Supplemental Report was based on all data collected. The Board is the judge of the law and facts in this case. The Supplemental Report has not been offered or admitted into evidence but has only been submitted as part of a Motion to Defer the Decision on the Legal basis for Division Order 10 A, and provided to Genwal in order to prepare for the hearing on technical aspects of

the Division Order. The Board is free to cross-examine the Division's witness and to admit or exclude portions of the report at the hearing if they believe it is appropriate or required by the Stipulation.

REPLY TO MOTION FOR DECISION ON LEGAL ISSUES

The Board has authority to modify its procedural orders, and should decide the legal basis for bonding as required by Divison Order 10A when and how it deems best.

Genwal appears to object to the submission of the Supplemental Report until the Board determines if the Division has legal authority to require bonding for water treatment under the facts of this case. The Division has argued that the Board should defer ruling on the legal basis for the Division Order 10 A until it has heard testimony from hydrology experts concerning the hydrologic data. It is believed that the technical data will help determine the potential to allow Genwal to use a conditional incremental bonding agreement.

Genwal argues that the parties' Procedural and Discovery Stipulation and the Board's Order approving it require the Board to decide the legal questions first. The Division believes the Board has the authority to modify that order for good cause. The rule governing pre-hearing orders provides: "Such order will control the subsequent course of the proceeding before the Board unless modified by subsequent order for good cause". (R641-107-200) And the rules allow the Board discretion to determine when and how to apply its rules. ("When good cause appear, the Board may permit a deviation from these rules so far as it may find compliance therewith to be impractical of

unnecessary or in the furtherance of justice or the statutory purposes of the Board"; (Procedural Rules of the Board R641-100- 400) and "These rules will be liberally construed to secure just speedy and economical determination of t all issues presented to the Board" (Procedural Rules of the Board R641-100-300)

However, even if it were bound to make a decision, there is no reason the Board's decision cannot be to defer or to decide that there is a basis for requiring a bond and that the extent of the legal authority may depend upon or be conditional on the type of bond required.

The Division believes the law clearly requires that the Division require bonding sufficient to prevent public liability for post mining water treatment when such an unanticipated polluted mine drainage occurs and it is reasonable to expect it to continue if mining were to cease. The Board can and should so find. The Division has not objection to the Board making that decision first. However, the next step is for the Board to determine if the kind of bond and amount as required by the Division is appropriate. The Division's motion to amend the Division Order 10A to allow the option of incremental bonding makes the hearing of technical data necessary before it can approve that type of bonding.

Respectfully submitted this 10th day of June, 2011.

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CERTIFICATE OF MAILING

The Undersigned certifies that a true and correct copy of the foregoing Division's Reply to Petitioners' motion to Strike and Motion for Decision on legal Issues was sent to the following persons ~~both~~ electronically ~~and by first class mail~~ this 10th day of June, 2011.

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